3-19-2013

State v. Johnson Respondent's Brief Dckt. 39573

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. NICHOLAS DAVID JOHNSON, Defendant-Appellant.	NO. 39573 Canyon Co. Case No. CR-2011-17691

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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Nature Of The Case

Nicholas David Johnson appeals from the judgment entered upon the jury verdict finding him guilty of second-degree murder. Johnson contends the district court committed evidentiary error and abused its sentencing discretion.

Statement Of Facts And Course Of Proceedings

Jarmey McCane was at Bill and Stacy Kron's house along with his sister and brother-in-law, Stacy and Raymond Lopez. (Trial Tr., p.281, Ls.9-16, p.573, Ls.3-19.) That's where Jarmey first met Johnson and where Johnson murdered Jarmey.

When Jarmey first arrived at the Krons, Bill introduced him to Johnson as a "good dude," to which Johnson responded, "nah." (Trial Tr., p.282, Ls.13-24.) Off and on through the evening, Johnson continued to say things to Jarmey, and Jarmey would just try to "blow it off" by saying, "[w]hatever, dude." (Trial Tr., p.285, Ls.12-15.) Johnson continued to engage in this behavior despite being asked to stop and "show some respect." (Trial Tr., p.285, L.19 – p.287, L.1; p.448, L.15 – p.450, L.6; p.469, Ls.1-8; p.470, Ls.4-7.) At one point, Bill decided he was "done with the situation," so he went to his room "grabbed a bat," and "told everybody the party . . . was over." (Trial Tr., p.472, Ls.7-11.) Stacy took the bat from Bill, put it in the garage, and everyone went outside and was standing in the street in front of the house, except Johnson who stayed on the front porch. (Trial Tr., p.473, Ls.2-8; p.505, L.15 – p.506, L.14; p.581, L.7 – p.583, L.23.)

While Bill was in the street apologizing to his friends, Johnson went back inside and took a large kitchen knife with an eight-inch long blade, which he concealed in his pocket. (Trial Tr., p.474, L.24 – p.476, L.6; p.615, L.4 – p.617, L.6; Exhibit 28.) Johnson returned to the porch and yelled something in a "cocky" tone to which Jarmey responded, "What?" and started walking toward Johnson. (Trial Tr., p.295, Ls.2-15; p.297, Ls.1-4; p.507, L.17 – p.508, L.13.) As soon as Jarmey reached Johnson, Johnson stabbed him. (Trial Tr., p.508, Ls.22-24.) Jarmey grabbed his neck and said, "I think I just got stabbed." (Trial Tr., p.511, Ls.11-23; p.590, Ls.10-14.) Jarmey collapsed in the front yard and died while Johnson fled in his truck. (Trial Tr., p.593, L.16 – p.594, L.1, p.513, Ls.3-4; p.595, Ls.1-14; Exhibit 2.) Raymond pursued Johnson on foot, punching out his driver's side window, but Johnson kicked Raymond in the stomach and got away. (Trial Tr., p.514, L.10 – p.515, L.3; p.625, Ls.3-11; Exhibit 19.)

Johnson fled to his girlfriend's house and changed his bloody shirt and, approximately 20 minutes later, he called 911 to report the stabbing.[1] (Trial Tr., p.625, L.20 – p.626, L.15.) When Johnson called 911, he calmly reported he just stabbed someone, claiming "two people came at [him] and tried to jump [him]" so he "grabbed a knife and stuck one." (Trial Tr., p.188, Ls.18-24; Exhibit 1.) When asked for his name, Johnson identified himself as "George Hernandez," and when asked where he was, Johnson hung up. (Exhibit 1.) When the dispatcher called back the first time, Johnson did not answer and the dispatcher got Johnson's voicemail, which said, "Hey this is Nick." (Trial Tr., p.188, L.25 –

[1] Raymond had already called 911 by that time. (Trial Tr., p.517, Ls.19-22.)

p.189, L.2; Exhibit 1.) The second time the dispatcher called Johnson, he answered and she asked, "Is this George?" (Exhibit 1.) Johnson calmly said, "Yes" and he repeated his story that he "stuck" a guy when two guys tried to "jump" him. (Exhibit 1.) Johnson also denied knowing the victim, said he was not "sure" whether the homeowner knew the victim, and said he was not "planning on going to jail." (Exhibit 1.) When the dispatcher asked whether Johnson was planning on harming himself, he said "hold on" and hung up. (Exhibit 1; Trial Tr., p.189, Ls.6-11.)

Law enforcement eventually located Johnson in his truck and initiated a traffic stop. (Trial Tr., p.312, L.4 – p.317, L.17.) Johnson's driver's side window was shattered, there was blood spatter in his truck and the bloody murder weapon was on the front seat mostly covered by a piece of paper. (Trial Tr., p.321, L.13 – p.322, L.1; Exhibits 24-29.) Johnson was taken into custody at which time it was noted he had no visible injuries and he declined an offer to be examined by paramedics. (Trial Tr., p.341, L.9 – p.342, L.6; p.346, L.10 - p.348, L.10; Exhibit 49.) When interviewed, Johnson again claimed he was attacked by two guys and he had the knife because he felt "threatened." (Exhibit 49.)

The state charged Johnson with second-degree murder. (R., pp.10-11, 23-24.) Prior to trial, the state filed a motion in limine seeking the admission of "certain photographs taken concerning the crime scene, victim, and autopsy." (R., pp.29-31.) Johnson objected to four of the photographs.[2] (10/25/2011 Tr.,

[2] At the hearing on the state's motion in limine, Johnson stated he objected to "numbers 2, 13, 14, and 15," however, it appears based on the description of those photographs provided at the pre-trial hearing that those numbers are

p.6, Ls.18-19.) The court ruled that one of the four was admissible and it would reserve ruling on the admissibility of the other three to see "how the facts of the case are going to tie in." (10/25/2011 Tr., p.15, L.21 – p.16, L.14.)

During trial, the court held a hearing outside the presence of the jury at which Dr. Robert Deters, the forensic pathologist who performed Jarmey's autopsy, testified regarding the relevance of five photographs – Exhibits 36, 37, 38, 39, and 40. (Trial Tr., p.381, L.8 – p.390, L.14.) Johnson again objected, arguing the photographs had "significant prejudicial value" and had no "probative value, in light of the fact that [the defense was] willing to stipulate to" "whatever facts the[] [state] want[ed] to put in the record about [Jarmey's] autopsy." (Trial Tr., p.391, L.4 – p.392, L.13; see also p.398, L.24 – p.399, L.6.) The court sustained Johnson's objection to Exhibit 36, but allowed the admission of Exhibits 37, 38, 39, and 40. (Trial Tr., p.407, Ls.10-11.)

The jury found Johnson guilty of second-degree murder. (R., pp.138-139.) The court imposed a unified life sentence with 15 years fixed. (R., pp.147-148.) Johnson filed a Rule 35 motion, which the district court denied. (R., pp.167-170; Order Denying Rule 35 Motion (augmentation).) Johnson filed a timely notice of appeal from the judgment. (R., pp.147, 149-153.)

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different than the exhibits numbers assigned to the same photographs at trial. (Compare 10/25/2011 Tr., p.6, L.18 – p.7, L.19, p.10, L.18 – p.13, L.4 with Exhibits 2, 13, 14, and 15.)

ISSUES

Johnson states the issues on appeal as:

1. Did the district court err when, over his Idaho Rule of Evidence 403 objection, it admitted four autopsy photographs without conducting the balancing test required under Rule 403?

2. Did the district court abuse its discretion when it imposed a unified life sentence, with fifteen years fixed, following Mr. Johnson's conviction for murder in the second degree?

3. Did the district court abuse its discretion when, in light of the new information provided, it denied Mr. Johnson's Rule 35 motion?

(Appellant's Brief, p.7.)

The state rephrases the issues on appeal as:

1. Has Johnson failed to cite any authority for the proposition that a district court must conduct its balancing under I.R.E. 403 on the record and does the record disprove Johnson's claim that the district court did not conduct such an analysis in this case?

2. Has Johnson failed to show the district court abused its discretion in imposing a unified life sentence with 15 years fixed upon the jury verdict finding Johnson guilty of murdering Jarmey McCane?

3. Has Johnson failed to establish the district court abused its discretion by denying his Rule 35 motion?

ARGUMENT

I.
Johnson Has Failed To Establish Error In The Admission Of Four Autopsy Photographs

A. Introduction

Johnson argues the district court erred in admitting the four photographs from Jarmey's autopsy, which were designated Exhibits 37, 38, 39, and 40. (Appellant's Brief, pp.8-10.) Johnson does not challenge the relevance of the photographs but instead argues the court "never balanced the relevance of the exhibits against the potential for substantial prejudice as required under Rule 403." (Appellant's Brief, p.10.) Johnson's argument fails for two reasons. First, Johnson fails to cite any authority that requires a district court to detail its 403 analysis on the record. Second, the record disproves Johnson's claim that the court did not engage in such an analysis. Johnson has, therefore, failed to show error in the admission of Exhibits 37, 38, 39, and 40.

B. Standard Of Review

"The question of whether evidence is relevant is reviewed de novo, while the decision to admit relevant evidence is reviewed for an abuse of discretion." State v. Shutz, 143 Idaho 200, 202, 141 P.3d 1069, 1071 (2006) (citing State v. Lamphere, 130 Idaho 630, 632, 945 P.2d 1, 3 (1997)). When the appellate court reviews an evidentiary ruling for abuse of discretion, it conducts "a multi-tiered inquiry, examining 1) whether the lower court rightly perceived the issue as one of discretion, 2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific

choices, and 3) whether the court reached its decision by an exercise of reason." State v. Hoak, 147 Idaho 919, 921, 216 P.3d 1291, 1293 (Ct. App. 2009) (citation omitted). "[W]hen reviewing the determination that the probative value of the evidence is not outweighed by unfair prejudice," the Court "use[s] an abuse of discretion standard." State v. Canelo, 129 Idaho 386, 393, 924 P.2d 1230, 1237 (Ct. App. 1996) (citations omitted).

C. Johnson Has Failed To Show Error In The Admission Of Exhibits 37, 38, 39, And 40

Exhibits 37 through 40 depict the stab wound Johnson inflicted on Jarmey including the path and depth of the wound, which measured seven to eight inches. (Trial Tr., p.428, L.16 – p.429, L.11; Exhibits 37-40.) The trajectory and depth of the wound was relevant to "match the physical evidence, in this case the body, with what actually happened at the scene." (Trial Tr., p.429, Ls.12-18.)

Under I.R.E. 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. I.R.E. 403. See State v. Guana, 117 Idaho 83, 88, 785 P.2d 647, 652 (Ct. App. 1989) ("All probative evidence is, to some extent, prejudicial. The question is whether that prejudice is unfair—that is, whether it harms the defendant not because of inferences which reasonably can be drawn from the facts, but because it inflames the jury and rouses them to 'overmastering hostility.'"). At the pre-trial hearing regarding the admissibility of the autopsy photos, the court noted, "The nature and extent of what's admitted is all balanced under what we call Rule 403." (10/25/2011 Tr., p.9, Ls.11-13.) The

court also explained the need to "balance" the relevance of the photographs against their "inflammatory nature." (10/25/2011 Tr., p.13, L.22 – p.15, L.13.)

At trial, when the court revisited the admissibility of the photographs following Dr. Deters' testimony, it stated:

> . . . I'm ready to make my rulings. Let me first of all apply the standard. We're talking about, you know, the -- there's a -- this is ultimately a discretionary call on the court. First of all, I looked at is it relevant. Are there facts at issue in the case that these exhibits and photographs will assist the jury in deciding. And then are they outweighed by cumulative or prejudicial or inflammatory impact that might inflame the passions of the jury.
>
> There are a number of cases where this is addressed by the Idaho Supreme Court and Court of Appeals in the State of Idaho. Most recently is State versus Reid, R-e-i-d. It's a 2011 case from May. 151 Idaho 80 is the Idaho cite, 253 P.3d.
>
> Also there's [sic] other cases that have come down. State v. Hawkins, 2000 -- I mean State v. Hawkins is 131 Idaho 396. Page 402 addresses the standard which is -- and I'm quoting the Idaho Supreme Court from the Hawkins case: It is well established that where allegedly inflammatory evidence is relevant and material to an issue of fact, the trial court must determine whether the probative value is substantially outweighed by the danger of unfair prejudice.
>
> It's the discretion of the trial court, and I'm going to quote this court a little farther here, and then I'm going to address some other -- another case: The court notes the fact that the photographs depict the actual body of the victim and the wounds inflicted on the victim and may tend to excite the emotions of the jury is not a basis for excluding them.

(Trial Tr., p.400, L.4 – p.401, L.13.)

The court thereafter rejected Johnson's argument that the state should be prohibited from "put[ting] on their dog and pony show for the jury" given his willingness to "stipulate to whatever facts they want to put in the record about this autopsy," and ruled that the state could admit Exhibits 37, 38, 39, and 40. (Trial

Tr., p.391, Ls.18-22, p.405, L.3 – p.406, L.21.) The court, however, rejected the admission of Exhibit 36, which was a picture of Jarvey's face "on the autopsy table," noting that the picture was not necessary for purposes of identification and although the picture was "not particularly graphic or gruesome," the court was concerned about its "inflammatory nature." (Trial Tr., p.398, Ls.14-15, p.406, Ls.4-14.)

On appeal, Johnson does not challenge the relevance of Exhibits 37 through 40, nor could he. See, e.g., State v. Beason, 95 Idaho 267, 277-79, 506 P.2d 1340, 1350-53 (1973); State v. Reid, 151 Idaho 80, 86-88, 253 P.3d 754, 760-62 (Ct. App. 2011). Instead, Johnson claims the district court failed to "conduct[ ] the requisite balancing test" in admitting the exhibits. (Appellant's Brief, p.9.) More specifically, Johnson contends that although the court specifically addressed the inflammatory nature of Exhibit 36, "it failed to do so with respect to the remaining four photographs." (Appellant's Brief, p.9.) This, Johnson argues, "amounts to error, and should result in [his] conviction being vacated." (Appellant's Brief, p.10.) Johnson's argument is without merit.

First, Johnson fails to cite any authority for the proposition that a trial court is required to conduct its prejudice analysis on the record. While a court undoubtedly must conduct the weighing required by I.R.E. 403 before excluding evidence, this does not mean a court errs in failing to explain its prejudice analysis on the record. See State v. Ruiz, 150 Idaho 469, 471, 248 P.3d 720, 722 (2010). It is well-settled that this Court will uphold the implicit determinations of the trial court if they are supported by the record and the applicable law. E.g.,

State v. Doe, 136 Idaho 427, 432, 34 P.3d 1110, 1115 (Ct. App. 2001); State v. Schevers, 132 Idaho 786, 788, 979 P.2d 659, 661 (Ct. App. 1999) (appellate court will review "implicit" findings where trial court does not articulate findings on record). Because this Court is capable of reviewing the trial court's admissibility determination without knowing the specifics of the district court's thought process, Johnson has failed to establish he is entitled to reversal on the basis that the district court allegedly did not specifically articulate that the probative value of Exhibits 37, 38, 39, and 40 was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Second, even assuming the record must reveal some indication that the trial court conducted a 403 analysis, the record in this case clearly reflects as much. Indeed, as Johnson acknowledges, his objection to the evidence was that it was unfairly prejudicial. (Appellant's Brief, p.8.) The district court's comments clearly indicate an understanding of the objection and analysis of the admissibility of the photographs in light of their "inflammatory" nature, including citation to the appropriate legal standard. (10/25/2011 Tr., p.13, L.22 – p.15, L.13, p.400, L.4 – p.406, L.3.) The court even warned the jurors they would be shown "somewhat graphic" and "[un]pleasant" pictures but admonished them not to allow the "potential inflammatory nature" of the pictures to "cloud [their] judgment in determining what happens." (Trial Tr., p.414, L.16 – p.415, L.17.) The court obviously would not give such an instruction had it been unaware of and failed to consider the prejudicial nature of the photographs in determining their admissibility.

That the district court did not employ the language Johnson apparently thinks it should have in relation to each photograph admitted falls far short of establishing the court failed to "balance[ ] the relevance of the exhibits against the potential for substantial prejudice as required under Rule 403." (Appellant's Brief, p.10.) Neither the law nor the record support Johnson's claim of error in relation to the admission of Exhibits 37, 38, 39, and 40; therefore, Johnson's claim fails.

II.
Johnson Has Failed To Establish His Sentence Is Excessive

A. Introduction

Johnson asserts his sentence is excessive "in light of the mitigating circumstances present in his case, including his sincere expression of remorse and regret and his lack of any prior felony convictions." (Appellant's Brief, pp.10-11.) Johnson has failed to establish an abuse of discretion given the nature of the offense and the objectives of sentencing.

B. Standard Of Review

A district court's sentence is also reviewed for an abuse of discretion. State v. Hanington, 148 Idaho 26, 27, 218 P.3d 5, 7 (Ct. App. 2009).

C. The District Court Acted Well Within Its Sentencing Discretion

In order to demonstrate an abuse of the district court's sentencing discretion, Johnson must "establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment."

State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). Those objectives are: "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrong doing." State v. Wolfe, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978). Johnson cannot meet his burden in this case.

On appeal, Johnson relies on what he characterizes as "remorse and regret" over Jarmey's murder. (Appellant's Brief, p.10.) While Johnson undoubtedly apologized and said he was "sorry," he continued to refer to his actions as a "mistake that [he] made that ended in absolute tragedy." (Appellant's Brief, p.12.) Johnson's act of taking a knife, concealing it, and then provoking Jarmey to approach him so he could stab him was hardly a "mistake." There was no evidence, other than Johnson's incredible testimony, that Jarmey ever touched Johnson and the jury rejected the theory that Johnson acted in self-defense. While Johnson may be sorry for his actions, he committed an intentional, senseless act of violence that resulted in Jarmey McCane's death.

Johnson's violent actions on June 25, 2011, were also consistent with his history. A former girlfriend reported that Johnson abused her, "[w]as always willing to fight," and "bragged he killed someone with a bat when he was younger." (PSI, p.5.) Another individual reported that Johnson "struck [him] in the head and rendered [him] unconscious" after he grabbed Johnson's throat because Johnson would "not stop taunting him." (PSI, p.5.) In addition, Johnson has a lengthy criminal history which includes juvenile adjudications for disturbing the peace, possession/consumption of alcohol by a minor, petit theft, resisting or

obstructing, and possession of tobacco, as well as misdemeanor convictions for possession of a controlled substance, driving under the influence (two convictions), resisting or obstructing (two convictions), providing false information to an officer, willful concealment, and battery (amended from domestic violence). (PSI, pp.8-15.) Johnson also has numerous prior driving-related offenses. (PSI, pp.9-15.) Most notably, Johnson was pending sentencing for domestic battery in the presence of a child and felony injury to a child when he murdered Jarmey. (PSI, pp.15-16.)

Although Johnson also attempts to blame alcohol for his actions on June 25, it is worth noting that, at trial, he was reluctant to accept responsibility for his alcohol use, appearing to blame his alcohol consumption on Bill Kron, claiming Bill "insisted on it." (Trial Tr., p.608, Ls.7-10.) In addition, Johnson has had the benefit of prior treatment, apparently to no avail. (PSI, p.21.) Indeed, the doctor who verified Johnson's past treatment noted that although Johnson "made some improvement," he "had a lot of anger." (PSI, p.21.)

Even considering the mitigating information in Johnson's case such as his "turbulent childhood" and family support (Appellant's Brief, p.13), as noted by the district court, the "facts of the case warrant the sentence" (Trial Tr., p.814, L.5). Johnson has failed to meet his burden of demonstrating that, under any reasonable view of the facts, his sentence is excessive.

III.
Johnson Has Failed To Establish Error In The Denial Of His Rule 35 Motion

A. Introduction

In addition to claiming his sentence is excessive as imposed, Johnson also argues the district court erred in denying his I.C.R. 35 motion. (Appellant's Brief, pp.14-15.) Specifically, Johnson claims his continued pursuit of a degree and programming while incarcerated and the fact that he has not "received any discipline actions" while incarcerated should have resulted in sentencing relief. (Appellant's Brief, p.15.) Application of the correct legal standards to Johnson's Rule 35 request shows Johnson has failed to establish an abuse of discretion.

B. Standard Of Review

If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this Court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007).

C. Johnson Has Failed To Establish The District Court Abused Its Discretion In Denying His Rule 35 Motion

In his Rule 35 motion, Johnson noted that he continues to pursue his degree in "Structural Fire Science" and that, while incarcerated, he has "not recieved [sic] any discipline actions." (R., p.169.) The court denied the motion finding Johnson failed to submit any new or additional information "that would support a reduction of [Johnson's] sentence" and concluding the sentence "is appropriate considering [Johnson's] criminal background and history, the

opportunities for rehabilitation and the circumstances in this matter." (Order Denying Rule 35 Motion, filed May 21, 2012 (Augmentation).) The court's conclusion was not an abuse of discretion, particularly given the nature of the "new" information, which was largely consistent with the self-portrait Johnson painted at the time of sentencing where his educational pursuits and his generally good behavior as an inmate were highlighted. (PSI, pp.17, 20, 22.)

Johnson has failed to establish that the district court abused its discretion in denying his Rule 35 motion.

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon the jury verdict finding Johnson guilty of second-degree murder.

DATED this 19th day of March, 2013.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of March 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SPENCER J. HAHN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General